

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

National Tobacco Company, L.P.,

Plaintiff,

-against-

Timothy Parker and Xavier Mosley, p.k.a.
Blackalicious, Raymond Riley, p.k.a. Boots
Riley, Solomon David and Marlon Irving,
p.k.a. Lifesavas,

Defendants.

ECF Case

08-CV-03383 (SAS)

**DECLARATION OF MATT MCDONALD IN
SUPPORT OF PLAINTIFF'S OPPOSITION
DEFENDANTS' MOTION TO DISMISS FOR
IMPROPER VENUE AND FORUM NON
CONVENIENS**

I, Matt McDonald, declare as follows:

1. I am Vice President, Artists and Events of CMJ Network, Inc. ("CMJ"), which acts as an agent for defendant National Tobacco Company, L.P. ("NTC") and runs NTC's ZigZag® Live ("ZigZagLive") promotions. I have personal knowledge of the matters set forth herein, and, if called as a witness, I could and would testify competently thereto.
2. I work at CMJ's headquarters in New York, New York. CMJ runs the ZigZagLive promotions from its New York offices and controls the contents of the website www.zigzaglive.com from CMJ's New York offices.
3. I negotiated with Tom Chauncey, Galactic Funk Touring, Inc.'s booking agent, and Paul Peck, Galactic Funk Touring Inc.'s manager/agent, for ZigZagLive to sponsor four performances in specific markets: New York, NY, Boston, MA, Raleigh, NC, and Athens, Georgia in November 2007. A true copy of the Sponsorship Agreement for the Galactic Funk Touring, Inc. shows is attached as Exhibit A.
4. Tom Chauncey told me that the artists were enthusiastic about the sponsorship because it would help the tour break even or be profitable.
5. Mr. Chauncey also told me in the course of negotiating the Sponsorship

Agreement that the touring party was called Galactic Funk Touring, Inc. ("Galactic Funk"), so that the Agreement should list Galactic Funk Touring, Inc., rather than "Galactic" as a party.

6. Paul Peck requested that in promoting the Galactic Funk Touring, Inc. shows on the ZigZagLive tour that we use specific artwork. A true copy of a printout of an e-mail chain between me, Paul Peck and Tom Chauncey is attached as Exhibit B. The artwork available on the www.galacticfunk.com website that was referred to in the e-mail contained references to Boots Riley and Lifesavas.

7. Those materials on the www.galacticfunk.com website included the names and likenesses of Defendants – that is, Boots Riley and Lifesavas.

8. Mr. Peck requested changes to ZigZagLive promotional materials containing reference to Boots Riley and Lifesavas. Mr. Peck directed in one e-mail "I have no problem with the general look of it but need for the bands, guest MC and support info to be as a whole larger (in respect to the club tour title and tag). Please make the band name and all of the artist info the biggest info in the image." After we altered the promotional materials to increase the size of reference to Boots Riley and Lifesavas along with the other performer names, Mr. Peck approved the artwork. See Exhibit B

9. It was through Mr. Peck indicating that I should use the artwork referring to all of the performing artists on the enumerated tour dates, including Boots Riley and Lifesavas in this action, that I understood the identities of all the artists who would be performing as, and sponsored in, Galactic Funk Touring, Inc. on the ZigZagLive tour.

10. I further understood that Mr. Peck and Mr. Chauncey were acting as agents for Galactic Funk Touring, Inc. as a whole. Specifically, neither Mr. Peck nor Mr. Chauncey ever informed me that they did not have authority to represent all of the performing artists in the touring group with regard to the ZigZagLive tour. Nor did either of them tell me that I should contact anyone else to seek approval for use of the artists' names and likenesses. Instead, Peck specifically approved ZigZagLive promotional materials identifying all of the artists performing in the sponsored performances, including Defendants.

11. ZigZagLive's promotional materials and website referring to Boots Riley and Lifesavas used names, likenesses and links to their own web pages that were obtained from the www.galacticfunk.com website to which Mr. Peck referred me. We did not create the references to Defendants ourselves – the ZigZagLive promotional materials were created using the template provided by Mr. Peck that contained references to Defendants.

12. The ZigZagLive website also had blogs and show reviews of the sponsored performances as well as a drop down menu which directs viewers to a “poster” section on which fans may apply to receive autographed posters of the artists who appeared on the ZigZagLive tour.

13. I attended the ZigZagLive-sponsored concert in November 2007 in Raleigh, North Carolina at which the band Galactic featuring Boots Riley and Lifesavas performed.

14. At the show, Lifesavas spoke with ZigZagLive marketing representatives at a ZigZag Live table. The table included a number of items prominently featuring the Zig-Zag® brand, such as t-shirts, posters, and cigarette paper products. Further, the ZigZagLive promotional materials that included Boots Riley and Lifesavas and had been approved by Mr. Peck were present and obvious at the venue.

15. The promotional tables that were present during Defendants' shows had ZigZagLive and Zig-Zag® banners and merchandise. Attached hereto as Exhibit C are true copies of two photographs of the ZigZagLive promotional material display table at the Raleigh, North Carolina performance by the Galactic Funk touring group, including Defendants Boots Riley and Lifesavas, that I attended.

16. I spoke to Defendants Solomon David and Marlon Irving of Lifesavas at the Raleigh show. When they stopped by the ZigZagLive table I told them we were there for ZigZagLive, which was sponsoring some of the shows on the tour.

17. Rather than showing surprise or alarm at the affiliation with ZigZagLive, they indicated to me that ZigZagLive's participation was cool.

18. As the photographs make clear, the promotional displays at the concert venues

feature both ZigZagLive and Zig-Zag® products in an obvious and prominent manner.

19. As part of the promotion under the Agreement, ZigZagLive representatives asked the artists performing at shows to sign ZigZagLive posters for the performances to be given away to fans at the shows and also to be featured and given away to fans through the ZigZagLive website. Exhibit D hereto is a true copy of a screenshot from the “posters” section of the ZigZagLive website.

20. I have seen the posters that Boots Riley, and Solomon David and Marlon Irving of Lifesavas all willingly signed, which prominently feature the ZigZagLive logo. Attached hereto as Exhibit E are true copies of such posters signed by Boots Riley and by Solomon David and Marlon Irving as Lifesavas, respectively.


21. The “Galactic” posters (like those that were autographed and signed by Defendants) are also displayed prominently on the ZigZagLive tables. See Ex. C.

22. Based upon my personal interaction with Lifesavas at the Raleigh show, the size and nature of the ZigZagLive promotion, and the fact that all Defendants willingly autographed ZigZagLive promotional posters – all of which occurred in 2007 – I find it incredible that they claim to have only recently (*i.e.*, in 2008) “discovered” ZigZagLive’s use of their names and likenesses.

23. Neither Boots Riley nor the members of Lifesavas ever complained to me about sponsorship by or affiliation with ZigZag Live at the events, and I am not aware that they made any complaints regarding ZigZag Live’s sponsorship before late March 2008.

24. Based upon Mr. Peck’s approval of promotional artwork identifying Boots Riley and Lifesavas, his direction to increase the size of reference to Boots Riley and Lifesavas along with the other performers, the performance of Boots Riley and Lifesavas with Galactic and others at the ZigZagLive sponsored events, and their lack of complaint regarding ZigZagLive sponsorship at those events, I understood that “Galactic Funk Touring, Inc.” included all performers for the shows identified in Exhibit A and that Mr. Peck had authority as agent to sign for all performers.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration was executed on June 19, 2008 at New York, New York.



Matt McDonald

EXHIBIT

A

**Zig-Zag Live 2007
ARTIST SPONSORSHIP AGREEMENT**

SPONSORSHIP AGREEMENT (the "Agreement"), dated as of October 9, 2007, by and between **Galactic Funk Touring Inc** ("You" or "Your") and **CMJ Network Inc.**, as agent of and on behalf of the **Zig-Zag Live Club Tour 2007 ("ZZL")**, with offices located at **151 W 25th St, 12 Floor, New York NY 10001** (each a "Party" and collectively the "Parties").

1. SUBJECT OF AGREEMENT

In consideration of the mutual covenants and agreements set forth herein and in reliance upon the representations and warranties contained herein, and for other good and valuable consideration, you and ZZL agree as of the above date as follows:

You agree that ZZL will sponsor your performance ("Performance") as part of the **Zig Zag Live Club Tour 2007 ("Tour")** on the dates listed below, at the venues named below. The Agreement shall be wholly separate and distinct from any agreement You may have with the venue referenced below for Your performance on the date referenced below.

Dates: November 2, 6, 17, 18, 2007

Venues: Georgia Theatre (November 2), Lincoln Theatre (November 6), Roseland (November 17), Paradise Rock Club (November 18)

2. SIGNAGE, ADVERTISING, TABLE PLACEMENT AND MARKETING

You agree to allow the display by ZZL of banners, posters and/or other signage at your Performance on the date(s) and venue(s) listed above, with such signage to be of the following nature and size:

No more than 1 neon Zig Zag sign (approximately 33" x 25" x 10")
No more than 1 banner (approximate size 36" x 48")

Such signage is to be displayed in the following locations at the venue (subject to venue approval):

1 neon sign by a ZZL exhibition table or in an appropriate and acceptable space in the performance area or behind the bar but not on, next to, or hanging over the stage
Banner may be displayed throughout the venue other than on, next to, or hanging above stage
(ZZL will make best effort to keep signage out of performance area when venue space allows for it.)

Additionally ZZL will also have an exhibition table and its representatives present at the venue at the table during Your Performance. Notwithstanding the foregoing, if the venue refuses to allow the signage, table, and/or representatives, this will not be considered a breach of the Agreement. ZZL will arrange all on-site details; you are not responsible for making any on-site arrangements (hanging banner, setting up table, etc).

Further, You authorize and approve ZZL to advertise and promote your Performance in any manner deemed appropriate by ZZL including but not limited to: television, radio, print and the Internet ("ZZL Marketing") unless expressly prohibited by law. You also authorize and approve that ZZL has the rights to use the Your name, approved voice and/or approved

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likeness for the purposes of advertising and marketing the Tour without further compensation, unless prohibited by law. Where possible, ZZL will provide all ZZL Marketing to you for approval. ZZL Marketing includes the use of your approved musical compositions in the form of streamed audio (one song) and downloadable audio (one song, different from the streamed song), Your artist/band biography and approved photo or approved portions thereof on www.zigzaglive.com, or in advertisement and/or in the promotion of the Tour. Material provided by you will be available for free download for the period of October 1, 2007 – December 31, 2007. Upon expiration of download period, songs will be removed from the www.zigzaglive.com site. Songs remain registered and published intellectual property of you and usage by ZZL Marketing does not constitute transfer of ownership. ZZL shall not use your name, likeness, or songs in a manner which would infer that you endorse ZZL or promote its products in any way.

3. COMPLIMENTARY TICKETS

ZZL and agent Partisan Arts will arrange for up to ten (10) complimentary tickets to ZZL from the promoter/venue.

4. CONSIDERATION

In consideration of ZZL's sponsorship of your Performances, ZZL agrees to remit to you a fee in the aggregate sum of \$9000 ("Sponsorship Fee"). The Sponsorship Fee shall be paid via ZZL corporate check in the sum of \$4500 within 2 weeks of execution of this Agreement with the remaining \$4500 of the Sponsorship Fee to be paid (in the amount of \$1125 per Performance) immediately upon successful completion of each of the three Performances.

5. NO PARTNERSHIP OR JOINT VENTURE

Nothing contained herein shall in any way create any association, partnership, joint venture, or the relation of principal and agent between the parties hereto or be construed or evidence the intention of the parties to constitute such. Neither of the parties hereto shall hold itself out contrary to the terms of this provision.

6. RELEASE AND INDEMNITY

The Parties agree to indemnify and hold each other harmless and each of its successors and assigns, and its affiliates, officers, directors, shareholders, and employees, and their respective agents (collectively, the "Indemnities") from any and all manner of actions and causes of action, damages, liabilities, judgments, claims and demands whatsoever (or actions or proceedings in respect thereof) (collectively, "Damages"), which will, for all purposes of this Agreement include, but not be limited to, all costs of defense and investigation and all reasonable attorneys' fees and expenses, to which any Indemnities may become subject, insofar as such Damages arise out of or are based upon the Parties performance according to the terms and conditions contained herein or related thereto, whether any action, claim, suit, or proceeding giving rise to such Damages is instituted by or brought on behalf of the Parties or a third party, provided reduced to adverse judgment or settled with consent, except that neither Party shall be so indemnified to the extent that such Damages have arisen out of such Party's gross negligence, bad faith, willful misconduct or malfeasance in connection with the performance by that Party of its responsibilities hereunder. The provisions of this Section 5 shall survive termination of this Agreement.

7. LIMITATION OF LIABILITY

Other than due to gross negligence, bad faith, willful misconduct or malfeasance, neither Party will be liable to the other party or any third party for lost profits, loss of goodwill, or any special, indirect, consequential or incidental damages, however caused and on any theory of liability, arising in any way out of this Agreement or the relationship between the Parties. This limitation shall apply even if a party has been advised of the possibility of such damages, and notwithstanding any failure of

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essential purpose of any limited remedy. Notwithstanding the foregoing, ZZL specifically warrants that it will not do anything that will subject you to criminal or civil liability or penalties.

8. CONFIDENTIALITY; GENERAL PROVISIONS

The Parties agree that they will not use, or permit the use of, any of the information relating to any other Party hereto, furnished or to be furnished to each other in connection with this Agreement ("Information"), other than in connection with the transactions contemplated by this Agreement. The Parties also agree that they will not disclose, divulge, provide or make accessible (collectively, "Disclose") any of the Information to any person other than their responsible officers, employees, advisors, accountants or attorneys without the prior written consent of the other Party except as required by law or regulation.

The parties hereto agree that all understandings and agreements heretofore made between them with respect to the subject matter hereof are merged in this Agreement, which fully and completely expresses their agreement with respect to the subject matter hereof. There are no promises, agreements, conditions, understandings, warranties, or representations, oral or written, express or implied, between the parties hereto, other than as set forth in this Agreement. All prior agreements among the parties with respect to the subject matter hereof are superseded by this Agreement, which integrates all promises, agreements, conditions and understandings between the parties with respect to the subject matter hereof.

No waiver, modification or amendment of this Agreement shall be binding unless agreed to in writing and signed by an authorized officer of each of the Parties.

The parties acknowledge that (i) they have each had the opportunity to consult with independent counsel of their own choice concerning this Agreement and have done so to the extent they deem necessary, and (ii) they have each read and understand the Agreement, are fully aware of its legal effect, and have entered into it freely based on their own judgment and not on any promises or representations other than those contained in the Agreement.

9. GOVERNING LAW AND CHOICE OF FORUM

This Agreement and the rights and obligations of the parties hereto shall be governed by, and construed and enforced in accordance with, the laws of the State of New York, without giving effect to the conflicts of laws principles thereof. Each party hereby irrevocably submits that the proper forum for any action of any type, whether legal or equitable in nature, brought by either party to this Agreement, which action arises from or is related to any provision of this Agreement, shall be deemed to be under the jurisdiction of the courts of the State of New York, sitting in New York County, and the courts of the United States of America for the Southern District of New York.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date first above written.

By: 

Robert K. Haber

Matt McDonald

FOR ZZL

151 W 25th St, 12 Floor, New York NY 10001

Fax: 917.606.1914

By: Galactic Funk Touring, Inc.
SUPERFLY Management, Inc. Manager

Print Name

Manager
AFFILIATION WITH ARTIST

Address

64 West 3rd St - Suite 205
New York, NY 10003

EXHIBIT

B

Re: ZZL Ads for Galactic

Page 1 of 2

Alicia, Sandra T.

From: Paul Peck [paul@superflypresents.com]
Sent: Tuesday, October 16, 2007 12:25 PM
To: Matt McDonald
Subject: Re: ZZL Ads for Galactic

Hi Matt,

Would like to use the Galactic tour artwork so all of the promo has a consistent feel. The ad mat can be downloaded from www.galacticfunk.com. Please send along the final ad mat for approval — which I will turn around quickly. Would like to have either tour artwork elements incorporated into all promotion for this — online and press. Is this cool?

Thanks,

Paul

--

Paul Peck
Superfly Productions
64 West 3rd St
Suite 205/206
New York, NY 10012
(P) 212-375-9652
(F) 212-375-9653
www.superflypresents.com
www.bonnaroo.com
www.vegoose.com
www.galacticfunk.com

----- Forwarded Message

From: Matt McDonald <mattm@cmj.com>
Date: Thu, 11 Oct 2007 16:00:46 -0400
To: Tom Chauncey <tom@partisanarts.com>
Cc: <paul@superflypresents.com>
Conversation: ZZL Ads for Galactic
Subject: FW: ZZL Ads for Galactic

Hi Tom and Paul-

See below on when and where ads will be placed.

I've attached examples of in-house ads we used in Sept ...okay to use this (but w/ Galactic and new dates) or do we need to incorporate ad mat?

Thanks
matt

From: Ben Kammerle
Sent: Wednesday, October 10, 2007 2:34 PM
To: Matt McDonald
Subject: ZZL Ads for Galactic

Please find attached examples of ads we ran last round. The pdf is a print example and the jpg is online. Below is the list of places we will be running the ad and dates. Online dates are still being finalized

4/17/2008

Re: ZZL Ads for Galactic

Page 2 of 2

Athens Flagpole Magazine

17,000 weekly 24-Oct-07
Athens 31-Oct-07

Raleigh The Independent

50,000 weekly 24-Oct-07
Raleigh 31-Oct-07

NYC Village Voice

250,000 weekly 7-Nov-07
NYC 14-Nov-07
Boston Weekly Dig 7-Nov-07
Boston 14-Nov-07

--
Ben Kammerle
Marketing Manager
CMJ Network Inc.
151 W. 25th Street, 12th Floor
New York, NY 10001
T: 917-606-1908 x 272
F: 917-606-1914
www.cmj.com

----- End of Forwarded Message

4/17/2008

Re: ZZL/Galactic ad...

Page 1 of 2

Alcia, Sandra T.

From: Paul Peck [paul@superflypresents.com]
Sent: Thursday, October 18, 2007 1:31 PM
To: Matt McDonald
Subject: Re: ZZL/Galactic ad...

Looks fine now. Thanks.

On 10/18/07 12:27 PM, "mattm@cmj.com" <mattm@cmj.com> wrote:

Hi Paul-
 Please let me know if this works.
 Thx
 m

-----Original Message-----
 From: "Chris Risdon" <crisdon@cmj.com>

Date: Thu, 18 Oct 2007 12:09:21
 To: "Matt McDonald" <mattm@cmj.com>, "Ben Kammerle" <bkammerle@cmj.com>
 Subject: RE: ZZL/Galactic ad...

Updated ad. Any revisions to this will probably need to wait until tonight/tomorrow as I am about to head down to Puck (I'll have my laptop, so if I can connect to the server, I may be able to do any minor revisions). - Chris -----Original Message----- From: Matt McDonald Sent: Thu 10/18/2007 11:24 AM To: Chris Risdon; Ben Kammerle Cc: Subject: Fw: ZZL/Galactic ad... Doable? -----Original Message----- From: Paul Peck <paul@superflypresents.com> Date: Thu, 18 Oct 2007 10:54:40 To: Matt McDonald <mattm@cmj.com> Subject: Re: ZZL/Galactic ad... Hi Matt, I have no problem with the general look of it but need for the bands, guest MC and support info to be as a whole larger (in respect to the club tour title and tag). Please make the band name and all of the artist info the biggest info in the image. Also would prefer the show info on the left and the tour info right but if you feels strongly about the current placement I can live with it. Thanks, Paul On 10/18/07 9:56 AM, "Matt McDonald" <mattm@cmj.com> wrote: > Paul- > Can you let me know if this works? > We have to submit to the paper tomorrow and we're in the middle of the Music > Marathon right now, so any immediate answer would be greatly > appreciated....(sorry for the rush). > Thanks. > matt > > -----Original Message----- > From: Chris Risdon > Sent: Wed 10/17/2007 2:32 PM > To: Ben Kammerle > Cc: Winifred Chane; Matt McDonald > Subject: ZZL/Galactic ad... > > > Here's the ZZL/Galactic ad - per your direction, incorporating the > Galactic look and feel. The ad material was vertical quarter pages, and > this first ad (Athens/Flagpole magazine) was a horizontal 1/8 page, so > not every element could be squeezed in. > > According to the spreadsheet, this ad is due tomorrow, FYI > > - Chris > > > >

Updated ad. Any revisions to this will probably need to wait until tonight/tomorrow as I am about to head down to Puck (I'll have my laptop, so if I can connect to the server, I may be able to do any minor revisions).

- Chris

-----Original Message-----
 From: Matt McDonald
 Sent: Thu 10/18/2007 11:24 AM
 To: Chris Risdon; Ben Kammerle
 Cc:
 Subject: Fw: ZZL/Galactic ad...

Doable?
 -----Original Message-----
 From: Paul Peck <paul@superflypresents.com>

Date: Thu, 18 Oct 2007 10:54:40
 To: Matt McDonald <mattm@cmj.com>
 Subject: Re: ZZL/Galactic ad...

4/17/2008

Re: ZZL/Galactic ad...

Page 2 of 2

Hi Matt,

I have no problem with the general look of it but need for the bands, guest MC and support info to be as a whole larger (in respect to the club tour title and tag). Please make the band name and all of the artist info the biggest info in the image. Also would prefer the show info on the left and the tour info right but if you feels strongly about the current placement I can live with it.

Thanks,

Paul

On 10/18/07 9:56 AM, "Matt McDonald" <mattm@cmj.com> wrote:

> Paul-
> Can you let me know if this works?
> We have to submit to the paper tomorrow and we're in the middle of the Music
> Marathon right now, so any immediate answer would be greatly
> appreciated....(sorry for the rush).
> Thanks,
> matt
>
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> From: Chris Risdon
> Sent: Wed 10/17/2007 2:32 PM
> To: Ben Kammerle
> Cc: Winifred Chane; Matt McDonald
> Subject: ZZL/Galactic ad...
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>
>
> Here's the ZZL/Galactic ad - per your direction, incorporating the
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> According to the spreadsheet, this ad is due tomorrow, FYI
>
> - Chris
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4/17/2008

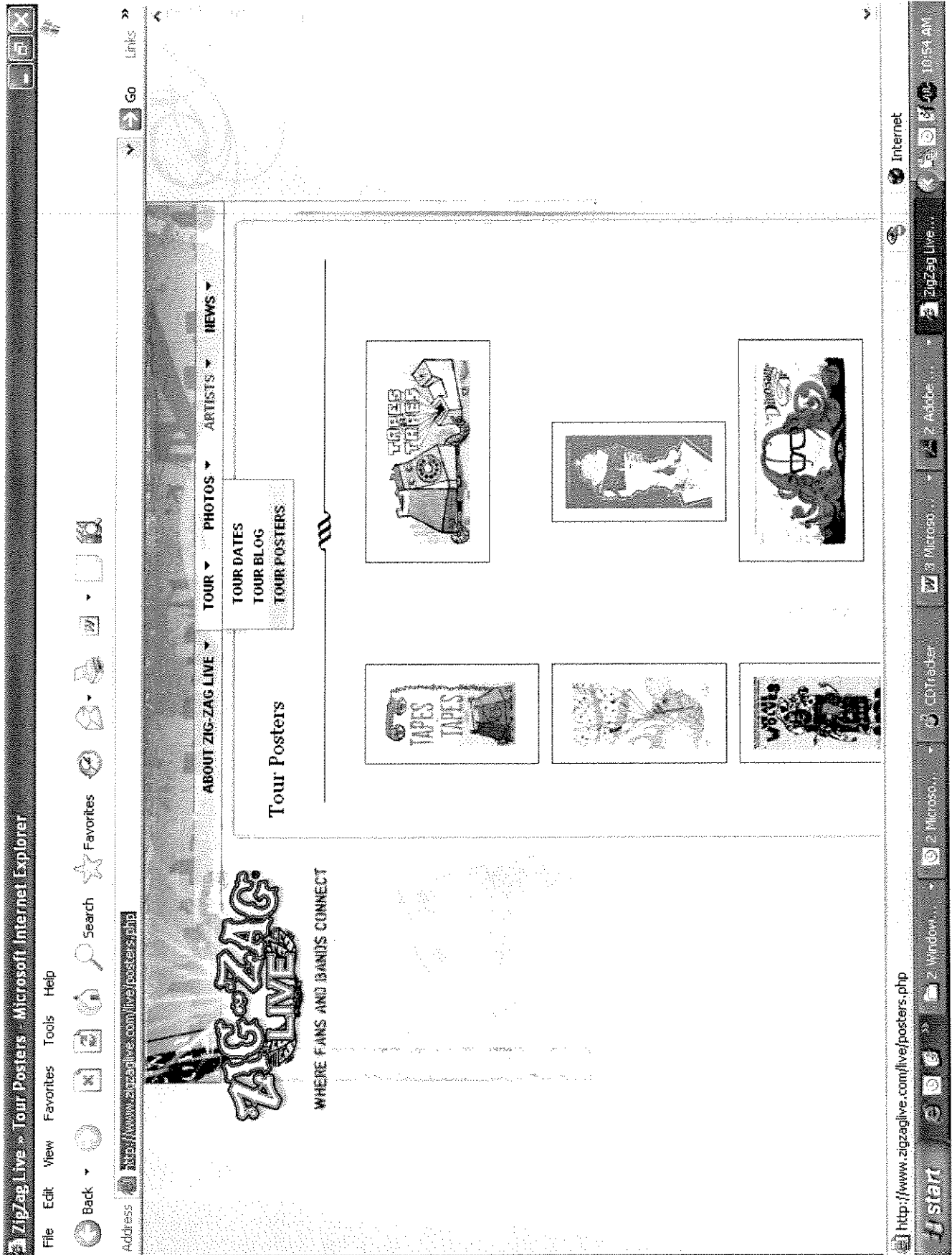
EXHIBIT C





EXHIBIT

D



EXHIBIT

E

